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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

TOM CARTLEDGE,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. In 1980 the Congress enacted the Equal Access to Justice Act (EAJA) which provides that individuals and small businesses which are not particularly well off may recover attorney fees incurred in judicially challenging the Federal Government if they were significantly successful and the Federal Government was especially overbearing. The statute provides, however, that attorney fees cannot exceed $125 per hour (adjusted for cost of living increases) unless "special factors" justify an enhanced fee. 28 U.S.C. § 2412(d)(2)(A)(ii)

This Court in Pierce v. Underwood, 487 U.S. 552 (1988) held that these special factors required "attorneys to have some distinctive knowledge or specialized skill" "such as patent law or knowledge of foreign law or language" which was (2) "necessary" for the litigation in question." Pierce, supra, 487 U.S. at 572. However, it appears that these and similar proficiencies are not required and therefore are unnecessary for litigation against the Federal Government in the Circuit Courts, and consequently many Circuits have been unable to satisfactorily implement Pierce.

Whether this Court's holding in Pierce, supra, essentially precludes any award of enhanced Equal Access to Justice Act attorney fees in the Circuit Courts since the distinctive knowledge and specialized skills of the type identified by this Court in Pierce are "unnecessary" in matters before the Circuit Courts, a circumstance many Circuit Courts seem unable to address..

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STATUTES

28 U.S.C.§2412 (Equal Access to Justice Act) 2, 4, 5,6,7

OTHER AUTHORITIES

Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (1980) 2

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Federal Circuit's Order on Application for Attorney Fees is unreported, but may be found at App. 1a. The Order of the Federal Circuit denying Rehearing or Rehearing en banc is unreported, but may be found at App. 4a.

JURISDICTION

The Federal Circuit's Order was entered on April 14, 2009. The Federal Circuit denied rehearing or rehearing en banc on June 22, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Preamble.

> (a) The Congress finds that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings.
>
> (b) The Congress further finds that because of the greater resources and expertise of the United States the standard for an award of fees against the United States should be different from the standard governing an award against a private litigant, in certain situations.

(c) It is the purpose of this title–

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States

Pub. L. No. 96-481, § 202, 94 Stat. 2321, 2325 (1980)

28 U.S.C. § 2412. Costs and fees

* * * * *

(d)(1)

(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

* * * * *

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

2) For the purposes of this subsection—

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that

(i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means

(i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or

(ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501 (c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j (a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5; * * *

STATEMENT OF THE CASE

The U.S. Office of Personnel Management (OPM) determined, following the death of Mr. Cartledge's wife from cancer, that she was improperly paid a retirement annuity after she retired from the Postal Service. OPM seized the lump-sum payment due on her death to recover part of the claimed overpayment and then began to surcharge Mr. Cartledge's survivor's benefits to recover the remainder. Mr. Cartledge unsuccessfully appealed to the OPM and then to the Merit Systems Protection Board. He then appealed the OPM/MSPB decisions to the Federal Circuit. App. 1a The Federal Circuit ruled that the OPM and MSPB decisions were unjustifiably incorrect, and remanded ordering the repayment of the monies seized.

Mr. Cartledge moved for enhanced attorney fees under the Equal Access to Justice Act. Acknowledging this Court's decision in Pierce, supra, Mr. Cartledge argued that his attorney's "distinctive knowledge" under Pierce was his knowledge of the almost indefinably idiosyncratic intellectual methodology utilized by government bureaucrats of all stripes to translate statutory enactment into regulatory language, a knowledge gained through training and eventual implementation of the specialty at a Federal Government agency. This specialized knowledge, therefore, was equivalent to the knowledge of a foreign language and patent law.

Judge Moore, writing for the Panel, permitted attorney fees, but rejected this specialized knowledge as "too vague" to satisfy Pierce's criteria for enhanced fees even though acknowledging that "we are skeptical that anyone could ever truly master such a skill." Rather, the Federal Circuit required specialized knowledge distinctly similar if not identical to the knowledge of a foreign language or patent law as set out in Pierce. .App. 2a

In his Petition for Rehearing or Rehcaring En Banc, Mr. Cartledge argued that the type of specialized knowledge identified by Pierce were not necessary or needful in the Circuit Court because, for example, one does not need to know a foreign language to litigate a case in the Circuit Courts where the required lingua franca is English. Further, the Circuit Courts do not require that a member of the patent bar prosecute patent matters before them, nor do they require that patent matters be heard by judges trained in patent law. Thus training in patent law is not needed. Under these circumstances, it was highly unlikely that enhanced fees could ever be awarded in the Federal Circuit, a result which was almost certainly contrary to the statutory intent. This result was verified by the apparent failure of the Federal Circuit to award enhanced fees since Pierce.

Consequently, Mr. Cartledge urged the Federal Circuit to resolve the Pierce conundrum by adopting the less restrictive EAJA fee-award methodology utilized in the First and Ninth Circuits. The Federal Circuit denied the Petition, however, without opinion.

REASONS FOR GRANTING THE PETITION

This Petition should be granted because of a significant division in the Circuits as they try to resolve the conundrum presented by this Court's holding in Pierce. Only this Court, which gave birth to Pierce, can provide the guidance necessary to clarify its import among the Circuits. Appropriate reimbursement under EAJA of attorney fees is a problem which is as sure to recur as is litigation against the Federal Government.

The breadth of the problem can be seen in the diversity of Circuit decisions. The Ninth Circuit, in a series of cases, established the following criteria for the award of enhanced fees under EAJA.

> 1. The attorney must possess distinctive knowledge and skills developed through a practice specialty.
>
> 2. The distinctive skills must be needed and utilized in the litigation.
>
> 3. These skills must not be available elsewhere at the statutory rate.

Pirus v. Bowen, 869 F.2d 536, 541-542 (9th Cir. 1989) ; Love v. Reilly, 924 F. 2d 1492, 1496 (9th Cir. 1991); National Resources Defense Council, Inc. v. Winter, 543 F.3d 1152 (9th Cir. 2008)

The First Circuit has adopted essentially the same standard. Atlantic Fish Spotters Association v. Daley, 205 F.3d 488 (1st Cir. 2000). The D.C. Circuit, however, guards the opposite perimeter, as does the Fifth Circuit and the Federal Circuit. See, e.g., Truckers United for Safety v. Mead, 329 F. 3d 891 (D.C. Cir. 2003); Estate of Cervin v. Commissioner of Internal Revenue, 200 F.3d, 351, 355 (5th Cir. 2000); Cartledge v. OPM, No. 2008-3133 (April 14, 2009) The U.S. Court of Trade has amassed much of the case law on the question in Former Employees of BMC Software, Inc. v. United States Secretary of Labor, 519 F. Supp. 2d 1291, 1346, et seq. (TRD 2007)

As a result of this conflict, the remedial purpose of EAJA, as set out in its Preamble, is often degraded. Geography should play no role in determining whether to judicially challenge inappropriate and improper Governmental actions. The denial of Mr. Cartledge's Federal Circuit Petition for Rehearing or Rehearing En Banc, which argued for the methodology adopted by

the First Circuit and Ninth Circuit, demonstrates that the intervention of this Court is necessary to clarify Pierce and fully effect the EAJA statutory purpose. Nowhere in either EAJA or its legislative history did Congress suggest that compensable legal services could only be provided by the neophytes and the dregs, yet that is the result in many Circuits and will remain so without this Court's intervention in resolving this important Federal question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Court of Appeals,
for the Federal Circuit.

2008-3133

TOM CARTLEDGE,

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

BEFORE: SCHALL, GAJARSA and MOORE

MOORE, Circuit Judge

ORDER

Tom Cartledge applied for attorney fees with respect to the work performed by his attorney in connection with his petition for review to this court of the Merit Systems Protection Board's decision in Cartledge v. Office of Pers. Mgmt., No. AT831M061041-1- 2 (M.S.P.B. Nov. 29, 2007). See Cartledge v. Office of Pers. Mgmt., No. 2008-3133, 2009 U.S. App. LEXIS 672 (Fed. Cir. Jan. 15, 2009). The government opposes. We award fees at the statutory rate with a cost-of-living adjustment to be determined by the government.

In Cartledge, we reversed the Merit Systems Protection Board's affirmance of the Office of Personnel Management's (OPM) decision that retirement annuity payments made between January 2, 1999 and February 28, 2001, by OPM to Mr. Cartledge's late wife, were an overpayment subject to collection by

OPM. Id. Mr. Cartledge applied for attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. The EAJA provides that a court shall award attorney fees to a prevailing party "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1).

As noted, Mr. Cartledge was a prevailing party by reason of our decision. Further, for reasons evident from our opinion, we agree with Mr. Cartledge that the position of the United States was not substantially justified. See Pierce v. Underwood, 487 U.S. 552, 565 (1988) (explaining that the government's position must be "justified to a degree that could satisfy a reasonable person").

We do not, however, agree with Mr. Cartledge's assertion that he is entitled to attorney fees at the rate of $440 per hour. See § 2412(d)(2)(A)(ii) ("[A]ttorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."). The parties agree that at a minimum, the $125 statutory rate should be adjusted for the cost of living using the Department of Justice's methodology. But Mr. Cartledge also asserts that he is entitled to a rate of $440 per hour because of a special factor—namely that this case has presented the need for distinctive knowledge of "the almost indefinably idiosyncratic intellectual methodology utilized by government bureaucrats of all stripes to translate statutory enactment into regulatory knowledge." Although we are skeptical that anyone could ever truly master such a skill, it is enough to observe that this alleged special factor is too vague to comport with the Supreme Court's interpretation of § 2412(d)(2)(A)(ii). See Pierce, 487 U.S. at 572 ("[Special factor] refers to attorneys having some distinctive

knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.").

WHEREFORE, upon consideration of Mr. Cartledge's application for attorney fees and the government's opposition thereto,

IT IS ORDERED THAT:

(1) The Department of Justice shall determine an adjusted rate by adding the appropriate cost-of-living adjustment to the $125 per hour base statutory rate set forth in the EAJA.

(2) Attorney fees are awarded for 122 hours of attorney time at the adjusted rate determined by the Department of Justice.

United States Court of Appeals,
for the Federal Circuit.

2008-3133

TOM CARTLEDGE,

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v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the [petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby, DENIED, and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate has already issued.

FOR THE COURT:

Jan Horbaly, Clerk